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March 9, 2005

Mr. Charles Terreni  
Chief Clerk of the Commission  
Public Service Commission of South Carolina  
Post Office Drawer 11649  
Columbia, South Carolina 29211

2005 MAR 10 10 11 AM  
COMMUNICATIONS SECTION  
U.S. DEPARTMENT OF JUSTICE

Re: Petition to Establish Generic Docket to Consider Amendments to  
Interconnection Agreements Resulting From Changes of Law  
Docket No. 2004-316-C

Dear Mr. Terrinni:

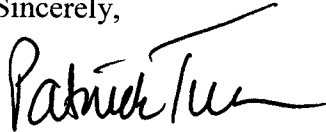
Earlier today, the Competitive Carriers of the South ("CompSouth") filed a copy of the Georgia Public Service Commission's Order, issued earlier today, that is consistent with the positions taken by various CLECs in this docket. BellSouth Telecommunications, Inc. is aware of at least one other decision, issued by the Michigan Public Service Commission, that apparently is consistent with at least some of the positions taken by the CLECs, and a copy of that Order is attached as Exhibit A to this letter. It is my understanding that SBC is appealing the Michigan Order, and BellSouth intends to seek a stay of and/or appeal the Georgia Order promptly.

BellSouth also is aware of other orders that are more in line with the positions taken by BellSouth in this docket. Today, for instance, the Indiana Utility Regulatory Commission issued the Order attached as Exhibit B. Also today, the Public Utilities Commission of Ohio issued the order attached as Exhibit C. Last month, the Texas Commission issued the two Orders attached as Exhibit D, and today it issued the Order on Clarification attached as Exhibit E.

Mr. Charles Terreni  
March 9, 2005  
Page Two

By copy of this letter, I am serving all parties of record.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick W. Turner". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Patrick W. Turner

PWT/nml  
Enclosure  
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# EXHIBIT A

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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|   |                  |
|---|------------------|
| In the matter, on the Commission's own motion, to ) |                  |
| consider Ameritech Michigan's compliance with )     |                  |
| the competitive checklist in Section 271 of the )   |                  |
| federal Telecommunications Act of 1996. )           | Case No. U-12320 |
| _____ )   |                  |

|  |                  |
|--|------------------|
| In the matter, on the Commission's own motion, to )      |                  |
| commence a collaborative proceeding to monitor and )     |                  |
| facilitate implementation of Accessible Letters issued ) |                  |
| by SBC Michigan and Verizon. )                           | Case No. U-14447 |
| _____ )  |                  |

At the February 28, 2005 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. J. Peter Lark, Chair  
Hon. Robert B. Nelson, Commissioner  
Hon. Laura Chappelle, Commissioner

**ORDER COMMENCING A COLLABORATIVE PROCEEDING**

On February 16, 2005, MCImetro Access Transmission Services LLC (MCImetro), which is a competitive local exchange carrier (CLEC) pursuant to the federal Telecommunications Act of 1996, 47 USC 251 et seq. (FTA), filed objections to certain proposals and pronouncements made in five "Accessible Letters" dated February 10 and 11, 2005 by SBC Michigan (SBC), which is an incumbent local exchange carrier (ILEC) under the FTA. Other CLECs quickly followed suit.

On February 18, 2005, LDMI Telecommunications, Inc. (LDMI), also filed objections to the five Accessible Letters.

On February 23, 2005, Talk America Inc., filed objections to one of the five Accessible Letters.

On February 23, 2005, TelNet Worldwide, Inc., Quick Communications, Inc. d/b/a Quick Connect USA, Superior Technologies, Inc. d/b/a/ Superior Spectrum, Inc., CMC Telecom, Inc., Grid4 Communications, Inc., and Zenk Group Ltd. d/b/a Planet Access filed comments in support of the objections raised by MCImetro and LDML.

On February 23, 2005, XO Communications, Inc. (XO), filed objections to one of the five Accessible Letters.

On February 23, 2005, SBC filed its response to the objections filed by MCImetro and LDML.

Accessible Letter No. CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p.1. Accessible Letter No. CLECALL05-017 (AL-17) and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a \$1 surcharge for mass market ULS and UNE-P. Accessible Letter No. CLECALL05-019 (AL-19) and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005 SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be

charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.<sup>1</sup>

The CLECs maintain that SBC has no unilateral right to change its wholesale tariffs. According to them, the Commission established a procedure in Case No. U-12320 whereby SBC must provide the CLECs with a 30-day notice of its intent to change any of its tariff provisions. The CLECs also point out that the Commission allowed a CLEC to object to SBC's proposed actions within two weeks of SBC's notice. In short, the CLECs insist that SBC may not unilaterally revise the rates, terms, and conditions under which SBC provisions wholesale telephone services. The CLECs seek a Commission order (1) establishing a proceeding to address the changes proposed by SBC, (2) prohibiting SBC from withdrawing its wholesale tariff until completion of this proceeding, (3) compelling SBC to honor its tariffs and interconnection agreements as they presently exist, (4) barring SBC from enforcing or implementing the Accessibility Letters until issuance of a final order in this proceeding, (5) directing SBC to continue to accept and provision new, migration, or move LSRs for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) until further order of the Commission, (6) directing SBC to continue to accept and provision new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission, and directing SBC not to increase the rates it charges for UNE-P, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission.

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<sup>1</sup> Although not contained in the record of the Case No. U-12320 docket, which is limited to consideration of issues related to Ameritech Michigan's compliance with the competitive checklist in Section 271 of the FTA, the Commission is also aware that Verizon has issued at least two similar Accessible Letters. The arguments raised by the CLECs with regard to SBC's proposed actions apply with equal force to the actions proposed by Verizon.

SBC responds by arguing that the modifications set forth in its Accessibility Letters are fully consistent with the Federal Communications Commission's (FCC) recent February 4, 2005 order regarding unbundling obligations of ILECs<sup>2</sup> and must therefore be honored by the CLECs and the Commission. According to SBC, the CLECs' objections are directly contrary to the recent rulings of the FCC. SBC states that the FCC has established a nationwide bar on unbundling as follows:

1. An ILEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops. 47 C.F.R. § 51.319(d)(2)(i).
2. Requesting carriers may not obtain new local switching as an UNE. *Id.* § 51.319(d)(2)(iii).
3. ILECs have no obligation to provide CLECs with unbundled access to mass market local circuit switching. *TRO Remand Order* ¶ 5.
4. The FCC's transition plan does not permit CLECs to add new switching UNEs. *Id.*
5. The FCC did not impose a Section 251 unbundling requirement for mass market local circuit switching nationwide. *Id.* ¶ 199.
6. The FCC found that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling. *Id.* ¶ 204.
7. The FCC found that continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore determined not to unbundle that network element. *Id.* ¶ 210.
8. The FCC found that unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. *Id.* ¶ 218.

According to SBC, the FCC's unbundling bar applies with equal force to network elements, such as shared transport, which can only be provided in conjunction with switching. SBC also

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<sup>2</sup>In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338. (*TRO Remand Order*).

asserts that the FCC reached a similar result with regard to signaling (§ 544) and for certain databases used in routing calls (§ 551). Therefore, SBC maintains that, given the FCC's bar on unbundled switching, it cannot be forced to provide unbundled access to any switch-related UNEs.

SBC next argues that the Commission should reject the CLECs' efforts to link their objections to Case No. U-12320 and Section 271 of the FTA. According to SBC, the Commission has no decision making authority under Section 271. Further, SBC maintains that Section 271 focuses on "just, reasonable, and non-discriminatory" pricing rather than on total element long run incremental cost (TELRIC) pricing, which it claims will be perpetuated by adoption of the CLECs' objections. Further, SBC insists that Section 271 provides no support for continuing its required provision of UNE combinations. Finally, SBC argues that the Commission and the CLECs are powerless to ignore the FCC's holdings or otherwise delay SBC's implementation of the FCC's pricing determinations.

The Commission finds that the objections filed by the CLECs have merit. In Paragraph No. 233 of the FCC's February 4 order, the FCC stated:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. *Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.* We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* Paragraph No. 233 (Emphasis added).

The emphasized portion of Paragraph No. 233 indicates that the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order. It also clearly indicates that



this Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Indeed, the Commission was specifically encouraged by the FCC to monitor implementation of the Accessible Letters issued by SBC and Verizon to ensure that parties do not engage in unnecessary delay. In addition, Paragraph No. 234 of the FCC's order indicates that SBC must immediately process a request for access to a dedicated transport or high capacity loop UNE and it can challenge the provision of such UNEs "through the dispute resolution procedures provided for in its interconnection agreements."

Given the urgency of the circumstances, the Commission finds that it should immediately commence a collaborative process for implementation of Accessible Letters issued by SBC Michigan and Verizon. In so doing, the Commission observes that the change of law provisions contained in the parties' interconnection agreements must be followed.

To avoid confusion, the Commission finds that a new proceeding that is devoted specifically to its monitoring and facilitating of the implementation of the Accessible Letters issued by SBC and Verizon should be commenced. Docket items 6, 7, 8, 9, 10, 11, 12, and 13 that currently appear in Case No. U-12320 should be placed into the docket file for Case No. U-14447. All additional pleadings related to implementation of Accessible Letters issued by SBC and Verizon should also be placed solely in the docket for Case No. U-14447.

The Commission intends that the collaborative proceeding should be limited in scope and duration. The Commission has selected the Director of its Telecommunications Division, Orjiakor Isiogu, to oversee all collaborative efforts. The Commission also directs that the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days.

During the time that the collaborative process is ongoing, the Commission directs that SBC and Verizon may bill the CLECs at the rate effective March 11, 2005, however, the ILECs may

not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there will be no undue benefit to the CLECs or harm to the ILECs due to the delay associated with the collaborative process, the Commission will also direct that there will be a true-up proceeding at the end of the collaborative process that will determine how rates and charges will be adjusted retroactively to March 11, 2005.<sup>3</sup>

The Commission has selected Case No. U-14447 for participation in its Electronic Filings Program. The Commission recognizes that all filers may not have the computer equipment or access to the Internet necessary to submit documents electronically. Therefore, filers may submit documents in the traditional paper format and mail them to the: Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909. Otherwise, all documents filed in this case must be submitted in both paper and electronic versions. An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at: <http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf>. The application for account and letter of assurance are located at <http://efile.mpsc.cis.state.mi.us/efile/help>. You may contact the Commission Staff at (517) 241-6170 or by e-mail at [mpscfilecases@michigan.gov](mailto:mpscfilecases@michigan.gov) with questions and to obtain access privileges prior to filing.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

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<sup>3</sup>See, Paragraph 228 and footnote 630 of the FCC's February 4, 2005 order.

et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. A collaborative process should be commenced in Case No. U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC and Verizon.

c. Pending completion of the collaborative process, SBC and Verizon may bill the CLECs at the rate effective March 11, 2005, however, SBC and Verizon may not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005.

d. Following completion of the collaborative process, a true-up proceeding should be conducted to adjust rates and charges retroactively to March 11, 2005.

THEREFORE, IT IS ORDERED that:

A. A collaborative process is commenced in Case No. U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC Michigan and Verizon.

B. Pending completion of the collaborative process and further order of the Commission, SBC Michigan and Verizon shall refrain from collecting any billed rate arising from implementation of any of the changes described in their Accessible Letters.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark

Chair

( S E A L )

/s/ Robert B. Nelson

Commissioner

/s/ Laura Chappelle

Commissioner

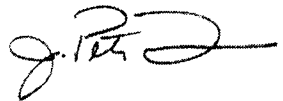
By its action of February 28, 2005.

/s/ Mary Jo Kunkle

Its Executive Secretary

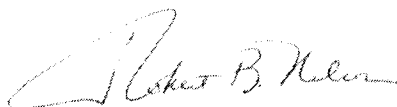
The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION



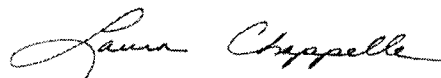
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Chair



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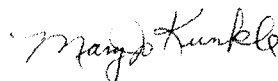
Commissioner



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Commissioner

By its action of February 28, 2005.



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Its Executive Secretary

# **EXHIBIT B**

# STATE OF INDIANA



INDIANA UTILITY REGULATORY COMMISSION  
302 W. WASHINGTON STREET, SUITE E-306  
INDIANAPOLIS, INDIANA 46204-2764

<http://www.state.in.us/iurc/>

Office: (317) 232-2701

Facsimile: (317) 232-6758

MAR 09 2005

INDIANA UTILITY  
REGULATORY COMMISSION  
CAUSE NO. 42749

COMPLAINT OF INDIANA BELL TELEPHONE  
COMPANY, INCORPORATED D/B/A SBC  
INDIANA FOR EXPEDITED REVIEW OF A  
DISPUTE WITH CERTAIN CLECS REGARDING  
ADOPTION OF AN AMENDMENT TO  
COMMISSION APPROVED  
INTERCONNECTION AGREEMENTS

You are hereby notified that on this date the Presiding Officers in this Cause make the following Entry:

1. **Background.** On February 25, 2005, the following competitive local exchange carriers ("CLECs") and Respondents in this proceeding: Acme Communications, Inc., eGIX Network Services, Inc., Cinergy Communications Company, Midwest Telecom of America, Inc., MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc., Intermedia Communications, Inc., Trinsic Communications, Inc., and Talk America Inc. (collectively "Joint CLECs") filed a *Joint Motion for Emergency Order Preserving Status Quo for UNE-P Orders* ("Motion") with the Indiana Utility Regulatory Commission ("Commission"). The Motion asserts that the Complainant in this Cause, Indiana Bell Telephone Company, Incorporated d/b/a/ SBC Indiana ("SBC Indiana"), which is an incumbent local exchange carrier ("ILEC"), has stated that it intends to take action on or before March 11, 2005, to reject Joint CLECs' unbundled network element platform<sup>1</sup> ("UNE-P") orders. Such action, according to the Joint CLECs, will cause them irreparable harm and will breach SBC Indiana's currently effective, Commission-approved interconnection agreements with the Joint CLECs. The Joint CLECs request that the Commission, on or before March 7, 2005, issue a directive requiring SBC Indiana to (1) continue accepting and processing the Joint CLECs' UNE-P orders, including moves, adds, and changes to the Joint CLECs' existing embedded customer base, under the rates, terms and conditions of their respective interconnection agreements and (2) comply with the change of law provisions of the interconnection agreements in implementing the Federal Communication Commission's ("FCC's") *Triennial Review Remand Order* ("TRRO").<sup>2</sup>

<sup>1</sup> The unbundled network element platform consists of a complete set of unbundled network elements (local circuit switching, loops and shared transport) that a CLEC can obtain from an ILEC in order to provide an end-to-end circuit.

<sup>2</sup> Order on Remand, *In re Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No.01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

Based on Joint CLEC's allegation that an emergency situation exists, a Docket Entry was issued on March 1, 2005, that modified the times, as found in 170 IAC 1-1.1-12, for SBC Indiana to file a Response to the Motion and for Joint CLECs to file a Reply to a Response. A Response and a Reply were timely filed on March 2 and March 4, 2005, respectively.

The Motion is in response to a statement in recent SBC Indiana Accessible Letters to Joint CLECs that, beginning March 11, 2005, SBC Indiana will no longer accept UNE-P orders. According to SBC Indiana, its plan to no longer accept UNE-P orders beginning March 11, 2005, is in compliance with that part of the FCC's February 4, 2005 TRRO which states that, as of the effective date of the TRRO (March 11, 2005), CLECs are not permitted to add new UNE-P arrangements using unbundled access to local circuit switching. Joint CLECs argue that such action by SBC Indiana would be a unilateral action in violation of SBC Indiana's interconnection agreements with the Joint CLECs.

2. **Joint CLECs' Position.** Joint CLECs point to the provision in each interconnection agreement that requires SBC Indiana to provide UNE-P to the CLEC at specified rates. Joint CLECs further state that any modification to an interconnection agreement made necessary by a change in law requires adherence to each agreement's specified change of law process which typically includes notice, negotiation and, if necessary, dispute resolution. Therefore, according to the Joint CLECs, SBC Indiana is required to continue to provide UNE-P to the Joint CLECs until such time as each agreement's change of law process has been fulfilled with respect to the change of law directive in the TRRO.

Joint CLECs contend that adherence to change of law processes will be substantive undertakings with respect to the TRRO's ruling that ILECs are no longer required to provide unbundled switching, because SBC Indiana is under obligations independent of Sections 251/252 of the federal Telecommunications Act of 1996<sup>3</sup> ("Act") to provide UNE-P to the Joint CLECs. Joint CLECs posit that, notwithstanding the TRRO's finding that ILECs are no longer required to make UNE-P available to CLECs, State statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order*<sup>4</sup> require SBC Indiana to continue to make UNE-P available to the Joint CLECs. The Joint CLECs also argue that the TRRO itself requires carriers to implement the findings in the TRRO by implementing appropriate changes to their interconnection agreements.

Joint CLECs point not only to the terms of their interconnection agreements and language in the TRRO as requiring adherence to the requisite change of law provisions, but also to our January 21, 2005 Docket Entry in this Cause that, in denying certain Motions to Dismiss filed by certain CLEC Respondents, stated we would require factual

<sup>3</sup> The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

<sup>4</sup> *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control*, 14 FCC Rcd 14712 (1999).



evidence relevant to each interconnection agreement's change of law provisions in order to determine if Commission intervention was an appropriate remedy. Joint CLECs conclude that it is appropriate for the Commission to preserve the status quo as to all of the issues raised in the applicable Accessible Letters by requiring SBC Indiana to engage in the relevant change of law processes that are mandated by the parties' interconnection agreements, by the FCC in the TRRO, and in our January 21, 2005 Docket Entry in this Cause.

3. **SBC Indiana's Position.** SBC Indiana contends that the language of the TRRO is unambiguous and even repetitive in its express forbiddance of new UNE-P orders as of March 11, 2005. SBC Indiana claims, therefore, that the provisions of the Accessible Letters that are the subject of Joint CLECs' Motion are merely SBC Indiana's plan to implement, and are in full compliance with, the TRRO. SBC Indiana further argues that implementation of the FCC's clear prohibition against new UNE-P as of March 11, 2005, does not require negotiations between carriers that have entered into interconnection agreements.

SBC Indiana also contends that the Commission lacks jurisdiction to stay an action of the FCC; that only the FCC itself or a federal court of appeals has such jurisdiction. As a result, according to SBC Indiana, any dispute with the FCC's bar on continued access to UNE-P as of March 11, 2005, must come as a challenge to the FCC order itself and not SBC Indiana's planned implementation of it.

4. **The TRRO.** In a further attempt to adopt rules implementing the Act's requirement that the FCC determine those unbundled network elements to which CLECs "at a minimum" need access in order to compete, the FCC issued its Triennial Review Order<sup>5</sup> ("TRO") on August 21, 2003. Among other things, the TRO found that CLECs were competitively impaired without unbundled access to ILECs' circuit switching for the mass market. The FCC determined that this impairment was primarily due to delays and other problems associated with ILECs' hot cut<sup>6</sup> processes. Accordingly, all state commissions, including this Commission, were directed to either determine that there was no such impairment in a particular market or develop a "batch" hot cut process that would efficiently provision multiple CLEC orders for circuit switching. As a result, this Commission initiated three Causes to address the directives of the TRO, including one proceeding devoted to developing a batch hot cut process.

Major parts of the TRO were almost immediately challenged in the Federal District Court of Appeals for the D.C. Circuit, which eventually vacated major portions of the TRO. In the end, appeals to the U.S. Supreme Court to reverse the D.C. Circuit were unsuccessful. Among other findings, the D.C. Circuit vacated the rules that allowed states to conduct impairment analyses and the FCC's national finding of impairment for

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<sup>5</sup> *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003).

<sup>6</sup> The physical process by which a customer is removed from the switch of one carrier and added to the switch of another carrier is referred to as a "hot cut."

mass market switching. The Court remanded those vacated parts of the TRO back to the FCC to make findings consistent with the Court's determinations. The result of that remand is the FCC's TRRO.

5. **The TRRO's Reasoning for Eliminating UNE-P.** In ruling to eliminate UNE-P, the FCC determined, based on the record developed during the TRO remand proceeding, that CLECs:

... not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary. We find that these factors substantially mitigate the *Triennial Review Order's* stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)'s "at a minimum" authority.<sup>7</sup>

The FCC elaborated on its concern that unbundling of mass market circuit switching has created a disincentive for CLECs to invest in facilities-based competition, by stating:

Five years ago, the Commission [FCC] expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. . . . The record demonstrates the validity of concerns that unbundled mass market switching discourages competitive LEC investment in, and reliance on, competitive switches. . . . Competitive LECs have not rebutted the evidence of commenters showing that competitive LECs in many markets have recognized that facilities-based carriers could not compete with TELRIC-based UNE-P, and therefore have made UNE-P their long-term business strategy. Indeed, some proponents of UNE-P effectively concede that it discourages infrastructure investment, at least in some cases. Some

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<sup>7</sup> TRRO, ¶ 199.

competitive LECs have openly admitted that they have no interest in deploying facilities. Particularly in residential markets, facilities-based competitive LECs have been unable to compete against other competitors using incumbent LECs' facilities at TELRIC-based rates, and are thus discouraged from innovating and investing in new facilities.<sup>8</sup>

6. **Discussion and Findings.** As noted above, the Joint CLECs have argued not only that the TRRO's change of law with respect to unbundling mass market circuit switching must be effectuated through the change of law provisions found in the parties' interconnection agreements, but also that Indiana statute and prior Commission Orders, Section 271 of the Act, and the *SBC/Ameritech Merger Order* independently require unbundling. In its Response to the Motion, SBC Indiana devotes a lengthy discussion to its refutation of each of these independent authority arguments. However, the Joint CLECs make clear in their Reply that they are not asking the Commission to resolve the issue of the applicability of these independent authorities. Instead, the Joint CLECs state that they raise these other authorities to demonstrate the sort of issues that must first be negotiated between SBC Indiana and the Joint CLECs and, if necessary, brought to dispute resolution.

The main issue we face in ruling on the Motion is whether the requirement of the FCC's TRRO prohibiting new UNE-P orders as of March 11, 2005, must be effectuated through the provisions of the parties' interconnection agreements regarding change of law, negotiation and dispute resolution, resulting in the possible and likely availability of new UNE-P orders after March 10, 2005, or if the FCC's intent is an unqualified elimination of new UNE-P orders as of March 11, 2005.

The FCC is clear in its decision to eliminate UNE-P: "Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."<sup>9</sup> This determination in the TRRO is then incorporated in the accompanying FCC rules: "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."<sup>10</sup>

The one qualification that the FCC makes with respect to this clear directive is to allow a one year transition period for existing UNE-P customers.

Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and

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<sup>8</sup> *Id.* at ¶¶ 218, 220.

<sup>9</sup> *Id.* at ¶ 199.

<sup>10</sup> 47 C.F.R. § 51.319(d)(2)(i).

does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.<sup>11</sup>

Joint CLECs do not address the ramifications of the relief sought in their Motion vis-à-vis the stated transition directives of the TRRO. One reading of the TRRO is that the embedded base is a snapshot of those customers being served by UNE-P, and those customers for whom a request to be served by UNE-P has been made, as of March 10, 2005. If CLECs can continue adding new UNE-P customers after March 10, 2005, pending modification of their interconnection agreements pursuant to change of law provisions, how is the composition of the embedded base to be determined? We assume Joint CLECs would contend that new UNE-P customers added after March 10, 2005, would be added to the embedded base. If so, are these post-March 10<sup>th</sup> customers also subject to transitioning off of UNE-P by March 11, 2006? The Joint CLECs, however, might consider these questions premature in light of their primary assertion, as stated in the Motion: "Unless and until the Agreements are amended pursuant to the change of law process specified in the Agreements, SBC Indiana must continue to accept and provision the Joint CLECs' UNE-P orders at the specified rates."<sup>12</sup>

We do not find Joint CLECs' position to be the more reasonable interpretation of the TRRO. First, as stated earlier, the FCC is clear in its intent to eliminate UNE-P. It is also clear that the FCC intends to eliminate UNE-P from its existing requirement to be unbundled pursuant to section 251 of the Act. For some purposes, pursuant to sections 251/252 of the Act, interconnection agreements exist so parties can implement the unbundling requirements of the Act. If mass market circuit switching is no longer an element required to be unbundled pursuant to sections 251/252 of the Act, it can therefore no longer be required to be unbundled within the context of an interconnection agreement for the stated purposes of sections 251/252.

We also find the FCC's language of the TRRO and accompanying rules unambiguous as to the intent that access to UNE-P for new customers not be required after March 10, 2005. In its clear directive to eliminate future UNE-P, and eventually UNE-P that serves the embedded customer base, the FCC wants to ensure that existing UNE-P customers are not abruptly removed from the network. Therefore, the FCC creates a one-year transition period, the purpose of which is to allow CLECs to make alternative arrangements for these customers. We read the TRRO to say that as of March 11, 2005, ILECs are not required, pursuant to section 251 of the Act, to accept new UNE-P orders for new customers. In addition, as of March 11, 2006, all UNE-P customers in

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<sup>11</sup> TRRO, ¶ 199.

<sup>12</sup> Motion, p. 10.

existence and all customer orders pending for such service as of March 10, 2005, must be transitioned off of UNE-P. Of course, ILECs and CLECs are free to negotiate the continued provisioning of UNE-P-like service.

As noted above, the TRRO creates the transition period by stating: "Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."<sup>13</sup> The effective date of the TRRO is March 11, 2005. The FCC then goes on to state: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."<sup>14</sup> We interpret the TRRO to say that the establishment of a one-year transition period is solely for the purpose of allowing an orderly movement of a CLEC's embedded customer base off of UNE-P, and even though UNE-P can continue to exist during this one-year transition period with respect to an embedded customer base, CLECs are not permitted to add new UNE-P customers during the transition period. We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005.

Clearly, too, the TRRO requires ILECs and CLECs to negotiate their interconnection agreements consistent with the findings in the TRRO:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.<sup>15</sup>

However, we cannot reasonably conclude that the specific provision of the TRRO to eliminate UNE-P, which includes a specific date after which CLECs will not be allowed to add new customers using UNE-P, was also meant to have no applicability unless and until such time as carriers had completed the change of law processes in their interconnection agreements. To reach the conclusion proposed by the Joint CLECs would confound the FCC's clear direction provided in the TRRO, with no obvious way to

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<sup>13</sup> TRRO, ¶ 199.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 233.

return to the transition timetable established in the TRRO. Had the FCC remained silent on the timing and pricing for the transition of the CLEC embedded customer base, it is more plausible that the parties would need to negotiate, and this Commission possibly arbitrate, the continued availability of UNE-P for new customers. Instead, the FCC is clear that, barring mutual agreement by the parties, UNE-P will no longer be available to new customers after March 10, 2005. This clear FCC directive leaves little room for the interpretation advocated by the Joint CLECs. For these reasons, we find our conclusion herein to be consistent with our finding in the January 21, 2005 Entry in this Cause that we will look to the parties' interconnection agreements in reviewing change of law issues. The elaboration that this Entry provides is that we cannot ignore the requirements of the changed law itself. The TRRO sets forth a default arrangement for the elimination of UNE-P. Unless and until the parties mutually agree to adopt an alternative arrangement instead of the default provisions of the TRRO, we must look to the FCC's directives in the TRRO for the elimination of UNE-P for new customers.

In their Motion, Joint CLECs raised some practical concerns about the effects of their inability to obtain UNE-P after March 10, 2005. Therefore, we find it appropriate to use this Entry to provide guidance on some of the disagreements that may arise as a result of this Entry's ruling. Joint CLECs express the concern in their Motion that "... if a CLEC customer requests remote call forwarding to his or her vacation home on March 1, 2005, and then asks the CLEC on March 12, 2005 to remove the remote call forwarding so that calls revert to their usual location, the CLEC will be unable to remove the call forwarding feature from the customer's account because of SBC's rejection of the CLEC's change request."<sup>16</sup> We disagree. We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customers, and those customers for which UNE-P has been requested, as of March 10, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.

Joint CLECs have also expressed concern that the agreement being offered by SBC Indiana for continued service after March 10, 2005, would require the immediate imposition of rates higher than the transition pricing established in the TRRO.<sup>17</sup> We do not find this to be an unreasonable position for SBC Indiana to take. Clearly, the intent of the one-year transition period, and its associated pricing, is to allow for a planned, orderly, and non-disruptive migration of existing UNE-P customers off of UNE-P to an alternative arrangement at an established price for the transition period. Our interpretation is that the transition period is not designed to be a period in which CLECs that negotiate an agreement to continue their service with SBC Indiana are then entitled

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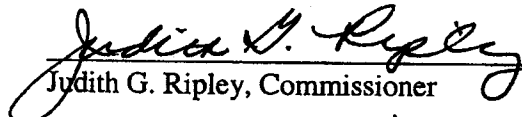
<sup>16</sup> Motion, p. 9.


<sup>17</sup> 47 C.F.R. § 51.319(d)(2)(iii) provides the following pricing requirements for UNE-P during the transition period: "The price for unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar, or (B) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that combination of network elements, plus one dollar. Requesting carriers may not obtain new local switching as an unbundled network element."

to continue with the same transition pricing. Once a CLEC agrees to continue its existing service arrangement, the issue of transitioning and the associated reasons for transition pricing cease.

It is our finding, therefore, that SBC Indiana, pursuant to the clear FCC directives in the TRRO, is not required to accept UNE-P orders for new customers after March 10, 2005. As to the Motion's request that we order SBC Indiana to comply with the change of law provisions of the interconnection agreements in implementing the TRRO, we do not make such an order, but nonetheless express our expectation that both SBC Indiana and all affected CLECs will make changes to their interconnection agreements consistent with the requirements of the TRRO. Accordingly, the Motion is denied.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Judith G. Ripley, Commissioner

  
\_\_\_\_\_  
William G. Divine, Administrative Law Judge

3-9-05  
\_\_\_\_\_  
Date

# **EXHIBIT C**



BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

|  |   |                        |
|--|---|------------------------|
| In the Matter of the Emergency Petition of | ) |                        |
| LDMI Telecommunications, Inc., MCImetro    | ) |                        |
| Access Transmission Service, LLC, and      | ) |                        |
| CoreComm Newco, Inc. for a Declaratory     | ) |                        |
| Ruling Prohibiting SBC Ohio from           | ) | Case No. 05-298-TP-UNC |
| Breaching its Existing Interconnection     | ) |                        |
| Agreements and Preserving the Status Quo   | ) |                        |
| with Respect to Unbundled Network          | ) |                        |
| Element Orders.                            | ) |                        |
|  |   |                        |
| In the Matter of the Petition of XO        | ) |                        |
| Communications Services, Inc., for an      | ) |                        |
| Emergency Order Preserving the Status      | ) |                        |
| Quo and Prohibiting Discontinuance of      | ) | Case No. 05-299-TP-UNC |
| Certain Unbundled Network Element          | ) |                        |
| Services.                                  | ) |                        |

ENTRY

The Commission finds:

- (1) On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand (TRRO) in CC Docket No. 01-338 in response to certain issues that had been vacated and remanded in part back to the FCC by the D.C. Circuit Court in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) cert. denied, 125 S.Ct. 313, 316, 345 (2004). Among other things, the FCC in the TRRO put into place new rules applicable to incumbent local exchange carriers' (ILECs') unbundling obligations with regard to mass market local circuit switching, high-capacity loops and dedicated interoffice transport.

Recognizing that it had removed significant unbundling obligations, the FCC directed that, for the embedded customer base, a transition period and transition pricing would apply during which the impacted competitive local exchange carriers (CLECs) would be able to continue purchasing the involved unbundled network elements. During the transition period, the ILECs and the CLECs were directed to modify their interconnection agreements, including completing any change of law processes to perform the tasks necessary for an orderly

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transition to alternative facilities or arrangements. The FCC determined the effective date of these new rules to be March 11, 2005.

- (2) On February 11, 2005, SBC made available on its CLEC website five accessible letters through which the company outlined the manner in which each of the SBC ILECs would implement the provisions of the FCC's new rules adopted in the TRRO.
- (3) On March 4, 2005, MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc. and CoreComm Newco, Inc. filed a petition (Case No. 05-298-TP-UNC) and a motion for emergency relief seeking a declaratory ruling prohibiting SBC Ohio from breaching its existing interconnection agreements and preserving the status quo with respect to unbundled network element orders. Similarly, on that same day, XO Communications Services, Inc. filed its own petition (Case No. 05-299-TP-UNC) seeking an emergency order preserving the status quo and prohibiting discontinuance of certain unbundled element (UNE) services.

The joint petitioners assert that, in order to avoid suffering irreparable damage to their businesses, the Commission must issue a directive no later than March 10, 2005, requiring SBC Ohio to continue accepting and processing the joint petitioners' orders for the UNE-platform, including moves and adds, to the joint petitioners' existing embedded customer base, as well as orders for DS1 and DS3 loops or transport, and dark fiber pursuant to the rates, terms and conditions of their respective interconnection agreements. The joint petitioners further request that SBC Ohio be directed to comply with the change of law provisions of the respective interconnection agreements regarding implementation of the TRRO. As a final matter, the joint petitioners request that the negotiation process contemplated as part of the change of law provisions in the interconnection agreements include the provisions of the TRRO and of the Triennial Review Order that are more favorable to the joint applicants.

- (4) SBC Ohio filed responses opposing the joint petitioners' petitions for emergency relief and preserving the status quo on March 8, 2005.

- (5) The Commission finds that the petitions filed by the joint applicants should be granted in part and denied in part. The FCC very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching, certain high-capacity loops, and certain dedicated interoffice transport would no longer apply to serve new customers. Just as clearly, however, the FCC also envisioned that, for the embedded customer base, a transition period would apply during which the FCC expected the parties to negotiate and adopt modifications to their interconnection agreements. In addition, the FCC recognized that access to certain UNEs addressed in the TRRO would still be necessary in order to serve the CLECs' embedded base of end-user customers.

In paragraph 233 of the TRRO, the FCC stated that:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* (Emphasis added).

Paragraph 233 clearly indicates that the FCC did not contemplate that ILECs would unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the TRRO. Just as clearly, this Commission was afforded an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Moreover, the Commission was specifically

encouraged by the FCC to monitor implementation of the accessible letters issued by SBC to ensure that the parties do not engage in unnecessary delay.

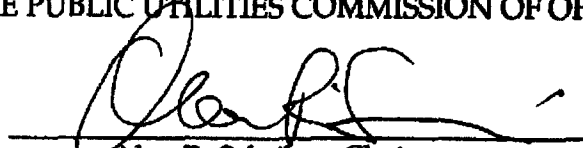
The centerpiece of the FCC's TRRO is the negotiation process envisioned to take place during the transition period to move the CLECs embedded customer base onto alternative facilities or arrangements. To date there have been few negotiations between SBC Ohio and the joint petitioners that would lead to interconnection agreement amendments that conform to the FCC's TRRO. Therefore, in order to afford the parties additional time to negotiate the applicable interconnection agreement amendments necessary to transition the CLECs embedded customer base as contemplated by the TRRO, SBC Ohio is directed to continue processing CLEC orders for the embedded base of unbundled local circuit switching used to serve mass market customers until no later than May 1, 2005. Accordingly, SBC Ohio is directed to not unilaterally impose those provisions of the accessible letters that involve the embedded customer base until the company has negotiated and executed the applicable interconnection agreements with the involved CLECs. During this negotiation window, all parties, both ILECs and CLECs, are instructed to negotiate in good faith interconnection agreement amendments to implement the FCC-ordered rule changes. Staff is empowered to work with the parties to ensure that meaningful negotiations take place consistent with the FCC's directive to monitor the negotiation process to ensure that the parties do not engage in unnecessary delay.

It is, therefore,

ORDERED, That the petitions filed on March 4, 2005, are granted in part and denied in part in accordance with finding 5. It is, further,

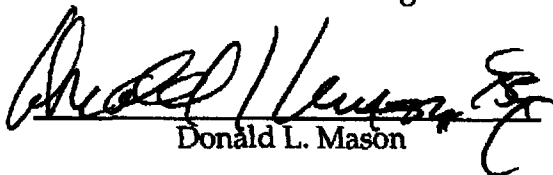
ORDERED, That a copy of this entry shall be served upon MCImetro Access Transmission Services, LLC, LDMI Telecommunications, Inc., CoreComm Newco, Inc., XO Communications Services, Inc., SBC Ohio, their respective counsel and upon all other parties of interest in this matter.

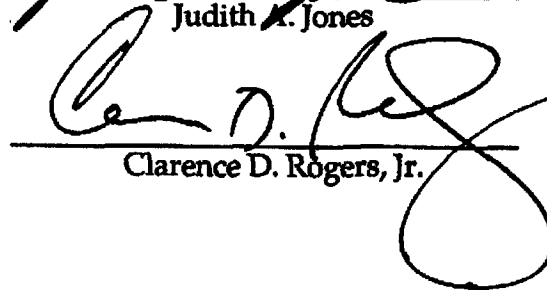
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Fergus

  
Judith R. Jones

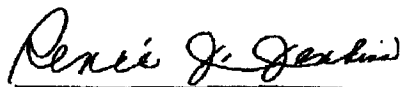
  
Donald L. Mason

  
Clarence D. Rogers, Jr.

JRJ/ct

Entered in the Journal

MAR 09 2005



Renee J. Jenkins  
Secretary

# **EXHIBIT D**

**DOCKET NO. 28821**

**ARBITRATION OF NON-COSTING  
ISSUES FOR SUCCESSOR  
INTERCONNECTION AGREEMENTS  
TO THE TEXAS 271 AGREEMENT**

§  
§  
§  
§

**PUBLIC UTILITY COMMISSION  
OF TEXAS**

FILED  
FEB 25 PM 3:17  
CLERK

**ORDER NO. 38  
ESTABLISHING PROCEDURAL SCHEDULE AND  
SCOPE OF PROCEEDING**

Based upon discussions with the parties at a prehearing conference held on February 24, 2005, the following procedural schedule is adopted for this proceeding:

|                                     |                          |
|-------------------------------------|--------------------------|
| <b>DIRECT TESTIMONY FILED</b>       | <b>MARCH 25, 2005</b>    |
| <b>REBUTTAL TESTIMONY FILED</b>     | <b>APRIL 8, 2005</b>     |
| <b>HEARING ON THE MERITS</b>        | <b>APRIL 21-22, 2005</b> |
| <b>INITIAL BRIEFS</b>               | <b>MAY 9, 2005</b>       |
| <b>REPLY BRIEFS (10-page limit)</b> | <b>MAY 16, 2005</b>      |
| <b>ARBITRATION AWARD</b>            | <b>MID-JUNE</b>          |
| <b>FINAL CONTRACTS FILED</b>        | <b>BY JULY 31, 2005</b>  |

**I. Procedural Matters**

Although this schedule does not require the filing of a Decision Point List (DPL), parties are requested to provide the Arbitrators with a joint DPL concurrent with, or, if possible, slightly before, the filing of direct testimony. In any event, parties are expected to organize their testimony by issue and to highlight which issues a particular witness will address to allow comparison of parties' positions on an issue-by-issue basis. To facilitate scheduling for the hearing on the merits, parties are asked to provide a list of panels, including all witnesses on each panel, no later than April 13, 2005.

To the extent parties wish to undertake further discovery, they shall do so consistent with agreements made in Phase I as to remaining numbers of requests for information (RFIs) etc. Upon agreement regarding discovery, parties shall inform the Arbitrators of their discovery arrangements, to include reference to any agreements regarding timing of or the need for, motions to compel and motions to strike.

## **II. Scoping of Track II**

Consistent with the Commission's discussion at the Open Meeting of February 24, 2005, arguments relating to unbundling obligations under state law shall not be included within the scope of Track II of this proceeding. Rulings upon preliminary motions, requests for discovery, including motions to compel, and issues regarding testimony or evidence, including motions to strike, shall be made consistent with the Commission's direction.

As referenced in the Interim Agreement Amendment approved by the Commission at its Open Meeting of February 24, 2005, parties are not precluded from questioning the PUC's interim determinations and requesting relief therefrom, including, but not limited to, requests for true-up at some later time.

## **III. CLLI Code Proceeding**

Consistent with the request of the Federal Communications Commission's (FCC's) letter of February 4, 2005, Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) was requested to file, in this docket, a list identifying by Common Language Location Identifier (CLLI) code no later than February 22, 2005. In particular, SBC Texas was asked to identify:

- which wire centers in SBC Texas' operating areas in Texas satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport, and
- which wire centers satisfy the non-impairment thresholds for DS1 and DS3 loops.

At this time, it is not clear whether the FCC will address these matters itself or whether state commissions will be expected to undertake these analyses. Parties are requested to discuss this issue among themselves and file a proposal for addressing these matters at some point after the hearing on the merits, including, but not limited to, suggesting timeframes and recommending whether to conduct such a proceeding on an ILEC-by-ILEC basis.



**IV. Parties' Reservations**

At the prehearing conference, although SBC Texas agreed to this procedural schedule, SBC Texas made clear that any agreement was not a waiver of its objection to the approval of the Interim Agreement Amendment. SBC Texas, and any other party wishing to do so, shall file any such objections, in writing, in this docket to ensure that the "running objection" is evident.

**SIGNED AT AUSTIN, TEXAS THE 25<sup>th</sup> DAY OF FEBRUARY 2005.**

**FTA § 252 ARBITRATION PANEL**

  
\_\_\_\_\_  
**DIANE PARKER**  
**ARBITRATOR**

  
\_\_\_\_\_  
**ANDREW KANG**  
**ARBITRATOR**

DOCKET NO. 28821

ARBITRATION OF NON-COSTING  
ISSUES FOR SUCCESSOR  
INTERCONNECTION AGREEMENTS TO  
THE TEXAS 271 AGREEMENT

§  
§  
§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS

FILED  
CLERK  
OCT 25 PM 3:43

ORDER NO. 39  
ISSUING INTERIM AGREEMENT AMENDMENT

Upon consideration of the parties' filings and discussion at the February 24, 2005, Open Meeting, and the expiration of the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs), the Public Utility Commission of Texas (Commission or PUC) issues the attached interim agreement amendment to govern parties' contractual relationships for the period of March 1 through July 31, 2005.<sup>1</sup> In issuing this interim agreement amendment, the Commission finds it necessary to act to prevent a lapse in the parties' contracts that could affect telecommunications services to end-user customers pending the completion of this docket.

The PUC seeks to ensure that the aforementioned expired agreements are made current to reflect recent changes in law under the Federal Communications Commission's (FCC) *Triennial Review Order* (TRO)<sup>2</sup> and *Triennial Review Remand Order* (TRRO).<sup>3</sup> The attached interim agreement amendment represents the Commission's preliminary determinations of the impacts of the TRO and TRRO. Parties are not precluded from arguing the merits of these issues in Track II of this proceeding and as appropriate, requesting relief, including, but not limited to, seeking true-up.

SBC Texas is directed to issue the attached interim agreement amendment through an Accessible Letter to all CLECs operating under the T2A, T2A-based interconnection agreements, or the contract developed in Docket No. 24542 no later than March 4, 2005. SBC Texas is further ordered to post this interim agreement amendment in a conspicuous location on its CLEC website, with appropriate links.

<sup>1</sup> The deadline of July 31, 2005 is the date under the current proposed procedural schedule by which parties expect to have completed this docket and have replacement contracts in place.

<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-388, 96-98, 98-147, Order, FCC 03-36 (Aug. 21, 2003) (*Triennial Review Order*).

<sup>3</sup> *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 (Feb. 4, 2005) (*Triennial Review Remand Order*).

SIGNED AT AUSTIN, TEXAS the 25<sup>th</sup> day of February 2005.

PUBLIC UTILITY COMMISSION OF TEXAS

  
\_\_\_\_\_  
JULIE FARSLEY, COMMISSIONER  
\_\_\_\_\_  
PAUL HUDSON, CHAIRMAN  
\_\_\_\_\_  
BARRY T. SMITHERMAN, COMMISSIONER

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**INTERIM AGREEMENT AMENDMENT WITH UNE CONFORMING LANGUAGE  
TO  
INTERCONNECTION AGREEMENT - TEXAS**

This Interim Agreement Amendment with UNE Conforming Language is to the approved Interconnection Agreement entered into by and between Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC Texas") and CLEC NAME ("CLEC").

WHEREAS, the original Agreement modified by way of this Amendment is the result of CLEC's decision to opt into the Texas 271 Agreement ("T2A") or parts thereof pursuant to Order 55 in Project 16251 dated October 13, 1999, or as a result of the Final Order issued in Docket No. 24542, as such Agreement may have been modified from time to time, and to the extent the original Agreement was only a partial election by CLEC to opt into the T2A, such Agreement may also include certain voluntarily negotiated or arbitrated appendices/provisions (hereinafter collectively "the T2A Agreement"); and

WHEREAS, the T2A Agreement expired October 13, 2003; and

WHEREAS, on April 11, 2003, SBC Texas delivered to CLEC a timely request to negotiate a successor agreement to CLEC's T2A Agreement ("Notice to Negotiate"); and

WHEREAS, Section 4.2 of CLEC's T2A Agreement provides that if either party has served a Notice to Negotiate then, notwithstanding the expiration of the T2A Agreement on October 13, 2003, the terms, conditions and prices of the T2A Agreement will remain in effect for a maximum period of 135 days after such expiration for completion of negotiations and any necessary arbitration; and

WHEREAS, a series of extensions of the T2A have occurred, and the termination of the T2A occurred as of February 17, 2005; and

WHEREAS, on January 23, 2004, SBC Texas filed its Omnibus Petition for Arbitration in Docket No. 28821 against all Texas CLECs with interconnection agreements originally expiring on October 13, 2003. Additionally, also on January 23, 2004, separate petitions of arbitration were filed against SBC Texas by the following CLECs: Stratos Telecom, Inc., Comcast Phone of Texas, LLC, Heritage Technologies, Ltd., FamilyTel of Texas, LLC and Navigator Telecommunications, LLC; Birch Telecom of Texas Ltd. L.L.P. and Ionex Communications South, Inc; CLEC Joint Petitioners; MCImetro Access Transmission Services, LLC, MCI Worldcom Communications and Brooks Fiber Communications of Texas, inc.; Sage Telecom of Texas, L.P.; AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc.; and CLEC Coalition.

WHEREAS, it appears that a successor interconnection agreement will not be approved in the Arbitration until after February 17, 2005, the termination date of CLEC's T2A Agreement; and

WHEREAS, pursuant to Order No. 34 in Docket No. 28821 and the Texas Public Utility Commission's 2/10/05 ruling extending the effective date of the T2A from 2/17/05 to 2/28/05, the Texas PUC has ordered extension of the term of CLEC's T2A agreement beyond the termination date of February 17, 2005 to February 28, 2005, and has instructed the parties to create an amendment to incorporate its decision on TRO elements Order Addressing Threshold Issues dated April 19, 2004 and Order Addressing Motion for Reconsideration of Threshold Issues dated August 18, 2004 in Docket No. 28821, along with the transition periods/pricing from the FCC's TRO Remand Order, released February 4, 2005, and scheduled to become effective March 11, 2005. The Texas PUC has stated that the amendment will, along with the CLEC's T2A agreement, Attachments 6-10, and the Arbitration Award on Track One Issues in Docket No. 28821, and the Texas UNE Rate Amendment resulting from the September 9, 2004 Revised

Arbitration Award in Docket No. 28600, govern as an interim interconnection agreement approved by the Texas PUC during the period between the TPUC-established termination of the T2A Agreement (i.e., February 28, 2005) and the earlier of: (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the Texas PUC; or (ii) July 31, 2005; and

WHEREAS, the interim agreement will automatically terminate the earlier of: (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and full intervening law rights are available to both parties under the interim agreement notwithstanding any language in CLEC's T2A Agreement, Attachments 6-10 to the contrary;

NOW, THEREFORE, in consideration of the foregoing, and the promises and mutual agreements set forth herein, and to facilitate the orderly progress of the Arbitration to conclusion, the T2A Agreement is hereby amended, as follows, to be effective only on an interim basis, for the purposes herein expressed, and for a finite, interim term to expire the earlier of (i) the date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and to make full intervening law rights available to both parties:

1. The Whereas clauses contained herein are incorporated into this Agreement.
2. The title of the T2A Agreement is hereby changed to "Interim Interconnection Agreement – Texas." All internal references to the "Agreement" are hereby changed to "Interim Agreement."
3. Sections 4.1, including Sections 4.1.1 and 4.1.2, Sections 4.2, 4.2.1 and 4.3 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety and replaced with the following:
  - 4.1 **Effective Date and Expiration/Termination.** The Interim Agreement shall be deemed effective following approval by the TPUC and commencing on the TPUC-established termination of the T2A Agreement February 28, 2005, and shall terminate, without any further action on the part of either Party, the earlier of:
    - 4.1.1 The effective date of approval by the TPUC of a successor agreement to the T2A or partial-T2A Agreement(s) in the above referenced Arbitration; or
    - 4.1.2 The date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or
    - 4.1.3 The effective date of a written and signed agreement between the parties that the Interim Agreement is terminated; or
    - 4.1.4 A proper request by CLEC that the Interim Agreement be terminated (subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions); or
    - 4.1.5 Termination for any other reason, such as non-payment (as set forth in Section 10 of the General Terms and Conditions), subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions; or
    - 4.1.6 July 31, 2005.
4. Sections 2.0 and 2.1 ("Effective Date") of the General Terms and Conditions of the Agreement are deleted in their entirety.
5. Nothing in this Agreement is to be interpreted as an agreement by SBC Texas to an extension of the T2A or any Section 271 obligations. The Interim Agreement, notwithstanding any provision to the contrary, is not based upon the same consideration or conditions as the T2A Agreement, and, regardless of when this Amendment is executed or effective, it shall not have the effect of extending the T2A Agreement, even if the

Agreement contained or contains, in whole or in part, provisions identical or substantially similar to provisions contained in the T2A Agreement. Any issues relating to Section 271 and any disputed issues with respect to language in the preamble to the underlying Agreement will be addressed in the proceedings related to the Parties' successor Interconnection Agreement, and the parties reserve their rights to all arguments related to the disposition of such issues.

6. Sections 1.3, 18.2, 18.3, and 30.2 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety, and replaced with the following:

## **2.0 Intervening Law**

- 2.1 In entering into this Amendment and Interim Agreement, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review: *Verizon v. FCC, et. al*, 535 U.S. 467 (2002); *USTA, et. al v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); the FCC's 2003 Triennial Review Order and 2005 Triennial Review Remand Order; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

7. Sections 14.1, 14.5, and 14.8 of Attachment 6: Unbundled Network Elements are hereby deleted and Section 1.0 ("Introduction") of Attachment 6: Unbundled Network Elements of the Agreement is hereby deleted and replaced with the following:

## **1.0 Declassified Network Elements No Longer Required**

- 1.1 TRO-Declassified Elements. Notwithstanding anything in this Interim Agreement, pursuant to the TRO and to the decision in *USTA II*, except as provided in Paragraph 3.0 below, nothing in this Interim Agreement requires SBC Texas to provide to CLEC any of the following items as an unbundled network element, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality: (i) entrance facilities; (ii) OCn dedicated transport; (iii) "enterprise market" local circuit switching for DS1 and higher capacity switching; (iv) OCn loops; (v) the feeder portion of the loop; (vi) any call-related database (other than the 911 and E911 databases), that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3, below); (vii) Operator Services and Directory Assistance that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (viii) Shared Transport and SS7 signaling that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (ix) packet switching, including routers and DSLAMs; (x) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over hybrid loops (as defined in 47 C.F.R. § 51.319(a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xi) fiber-to-the-home Loops and fiber-to-the-curb Loops (as defined in 47 C.F.R. § 51.319(a)(3)) ("FTTH Loops" and "FTTC Loops"), except to the extent that SBC Texas has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case SBC Texas will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH Loop or

FTTC Loop on an unbundled basis to the extent required by terms and conditions in the Agreement.

1.1.1 SBC Texas will provide written notice to CLEC of its intention to discontinue the provision of one or more of the TRO-Declassified Elements identified in Section 1.1, above under the Agreement. During a transitional period of thirty (30) days from the date of such notice, SBC Texas agrees to continue providing such TRO-Declassified Elements under the terms of the Agreement, to the extent required by the Agreement.

1.1.1.1 Upon receipt of such written notice, CLEC will cease new orders for such network element(s) that are identified in the SBC Texas notice letter. SBC Texas reserves the right to monitor, review, and/or reject CLEC orders transmitted to SBC Texas and, to the extent that the CLEC has submitted orders and such orders are provisioned after this 30-day transitional period, such network elements are still subject to this Paragraph Section 1, including the CLEC options set forth in subparagraph 1.1.1.1.1 below, and SBC Texas's right of conversion in the event the CLEC options are not accomplished by the end of the 30-day transitional period.

1.1.1.1.1 During such 30-day transitional period, the following options are available to CLEC with regard to the network element(s) identified in the SBC Texas notice, including the combination or other arrangement in which the network element(s) were previously provided:

- (i) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the network element(s) and/or the combination or other arrangement in which the element(s) were previously provided; or
- (ii) SBC Texas and CLEC may agree upon another service arrangement (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous resale service or access product or service may be substituted, if available.

Notwithstanding anything to the contrary in the Agreement, including any amendments to the Agreement, at the end of the thirty (30) day transitional period, unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable, under subparagraph (i), above, and if CLEC and SBC Texas have failed to reach agreement, under subparagraph (ii), above, as to a substitute service arrangement or element, then SBC Texas will convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service or arrangement, if available, at rates applicable to such analogous service or arrangement.

1.2 TRO Remand Order – Declassified High-Capacity Loop and Dedicated Transport Elements No Longer Required. Notwithstanding anything in the Agreement, effective March 11, 2005, pursuant to Rule 51.319(a) and Rule 51.319(e) as set forth in the TRO Remand Order, the following high-capacity loop and dedicated transport elements are no longer required to be provided by SBC Texas on an unbundled basis under the Agreement, whether alone, in combination, or otherwise:

- Dark Fiber Loops;
- DS1 Loops or DS3 Loops in excess of the caps or to any building served by a wire center described in Rule 51.319(a)(4) or 51.319(a)(5), as set forth in the TRO Remand Order, as applicable;

- DS1 Dedicated Transport or DS3 Dedicated Transport in excess of the caps or between any pair of wire centers as described in Rule 51.319(e)(2)(ii) or 51.319(e)(2)(iii), as set forth in the TRO Remand Order, as applicable; and/or
- Dark Fiber Dedicated Transport, between any pair of wire centers as described in Rule 51.319(e)(2)(iv), as set forth in the TRO Remand Order.

The above-listed element(s) are referred to herein as the "Affected Loop-Transport Element(s)."

- 1.2.1 After March 11, 2005, pursuant to Rules 51.319(a) and (e), as set forth in the TRO Remand Order, SBC Texas shall continue to provide unbundled access to the Affected Loop-Transport Element(s) to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Affected Loop-Transport Element(s) ordered by CLEC prior to March 11, 2005. The price for the embedded base Affected Loop-Transport Element(s) shall be the higher of (A) the rate CLEC paid for the embedded base Affected Loop-Transport Element(s) as of June 15, 2004 plus 15% or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Affected Loop-Transport Element(s), plus 15%. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

- 1.3 TRO Remand Order – Mass Market ULS/UNE-P – Notwithstanding anything in the underlying Agreement, effective March 11, 2005, pursuant to Rule 51.319(d) as set forth in the TRO Remand Order, Mass Market Local Circuit Switching, whether alone, in combination (as with UNE-P), or otherwise, is no longer required to be provided by SBC on an unbundled basis under the Agreement. Pursuant to the TRO Remand Order, "Mass Market" Local Circuit Switching means unbundled local circuit switching arrangements used to serve a customer at less than the DS1 capacity level (e.g., 23 or fewer Local Circuit Switching DS0 ports or the equivalent switching capacity).

- 1.3.1 After March 11, 2005, pursuant to Rule 51.319(d)(2)(iii), as set forth in the TRO Remand Order, SBC shall continue to provide unbundled access to Mass Market Local Circuit Switching/UNE-P to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Mass Market Local Circuit Switching/UNE-P ordered by CLEC prior to March 11, 2005. The price for the embedded base Mass Market Local Circuit Switching/UNE-P shall be the higher of (A) the rate CLEC paid for the embedded base Mass Market Local Circuit Switching/UNE-P as of June 15, 2004 *plus one dollar* or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Mass Market Local Circuit Switching/UNE-P, *plus one dollar*. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

- 1.3.2 Consistent with Paragraphs 199 and 216 of the TRO Remand Order, which recognize that CLECs must have time to transition their embedded customer-base that is served using Mass-Market Local Circuit Switching and UNE-P combinations to other facilities, including self-deployed switching and UNE loops, CLEC shall not be prohibited from ordering and SBC shall provision (i) additional UNE-P access lines to serve CLEC's embedded



customer-base and (ii) moves and changes in UNE-P access lines to serve CLEC's embedded customer-base during the time that this Amendment is in effect.

- 1.4 Consistent with Paragraph 100 of the TRO Remand Order, CLEC shall have the right to verify and challenge SBC's identification of fiber-based collocation arrangements in the listed Tier 1 and Tier 2 wire centers as part of Track 2 of the Arbitration.
  - 1.4.1 If the PUC determines that SBC's identification of fiber-based collocation arrangements is in error and if the correction of such error results in change to one or more wire center's classification as a Tier 1 or Tier 2 wire center, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.
- 1.5 Consistent with Paragraph 234 of the TRO Remand Order, and recognizing that the designation of wire centers as Tier 1 and Tier 2 is dependent on facts not within CLEC's knowledge or control, CLEC shall undertake a reasonably diligent inquiry and shall self-certify, based on that inquiry, that its request for a High-Capacity Loop and/or Transport is consistent with the requirements of the TRO Remand Order. SBC shall provision the requested High-Capacity Loop and/or Transport according to standard provisioning intervals and only after provisioning may it challenge CLEC's ability to obtain the High-Capacity Loop and/or Transport.
  - 1.5.1 If it is subsequently determined that the CLEC's request for a High-Capacity Loop and/or Transport is inconsistent with the requirements of the TRO Remand Order, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.
  - 1.5.2 Consistent with footnote 524 of the TRO Remand Order, High-Capacity Loops no longer subject to unbundling under Section 251, shall be subject to true-up to the applicable transition rate.
- 1.6 Consistent with Paragraph 133 of the TRO Remand Order, CLEC shall have the right to retain and obtain dark fiber transport as an unbundled network element under Section 251 only on routes for which the wire center on one end is neither Tier 1 nor Tier 2.
- 1.7 **CONVERSIONS:** CLEC shall have the right to order and SBC shall provision conversions of special access services to UNEs and UNE Combinations during the time this Amendment is in effect; provided however, that CLEC (1) satisfies the tests set out in Paragraphs 591 through 599 of the TRO and (2) the UNE or the UNE Combination requested is not subject to any of the transition plans identified in the TRO Remand Order. That is, CLEC may not seek to request the conversion of a special access circuit to a UNE or UNE combination unless the UNE itself or each of the UNEs sought to be combined is ordered to be provided on an unbundled basis in the TRO Remand Order.
- 1.8 **COMMINGLED ARRANGEMENTS:** CLEC shall have the right to order and SBC shall provision the following commingled arrangements consisting of the following High-Capacity Loops and Transport required to be unbundled under Section 251 or subject to the transition plan set out in the TRRO:
  - (a) UNE DS1 loop connected to:

- (1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;<sup>1</sup>
  - (2) a UNE DS1 transport which is then connected to a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;
  - (3) a commingled wholesale/special access DS1 transport.
- (b) UNE DS1 transport connected to:
- (1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport.
- (c) UNE DS3 transport connect to:
- (1) a commingled wholesale/special access higher capacity interoffice transport.

1.8.1 SBC and CLEC shall establish and agree to a manual ordering process for the commingled arrangements identified in 1.6 above no later than 10 business days following the effective date of this Amendment. Commingled arrangements ordered by CLEC using the agreed-upon manual ordering process shall be provisioned within the provisioning intervals already established by SBC for the wholesale service(s) with which CLEC requests a UNE be commingled.

1.8.2 SBC shall charge the rates for UNEs (or UNE combinations) that are commingled with facilities or service obtained at wholesale (including, for example, special access services) on an element-by-element basis, and such wholesale facilities and services on a facility-by-facility, service-by-service basis.

1.8.3 The Parties agree that the list of commingled arrangements identified in 1.6 above is not a complete list of all commingled arrangements that ultimately may be made available to CLEC following the conclusion of Track 2 of the Arbitration. The Parties' disputes regarding the availability of other commingled arrangements as well as the process and procedures for ordering commingled arrangements are part of Track 2 of the Arbitration.

8. TO THE EXTENT THE UNDERLYING AGREEMENT INCLUDES LINE SHARING PROVISIONS INCLUDE THE FOLLOWING: The following provisions are hereby added to the Agreement specific to the High Frequency Portion of the Loop" ("HFPL"):

**Grandfathered and New End-Users:** SBC Texas will continue to provide access to the HFPL, where: (i) prior to October 2, 2003, CLEC began providing DSL service to a particular end-user customer and has not ceased providing DSL service to that customer ("Grandfathered End-Users"); and/or (ii) CLEC begins/began providing xDSL service to a particular end-user customer on or after October 2, 2003, and on or before the close of business December 3, 2004 ("New End-Users"). Such access to the HFPL shall be provided at the same monthly recurring rate that SBC Texas charged prior to October 2, 2003 and shall continue for Grandfathered End-Users until the earlier of: (1) CLEC's xDSL-base service to the end-user customer is disconnected for whatever reason, or (2) the FCC issues its Order in its Biennial Review Proceeding or any other relevant government action which modifies the FCC's HFPL grandfather clause established in its Triennial Review Order and as to New End-Users, the earlier of: (1) and (2) immediately above; or (3) October 2, 2006.

<sup>1</sup> "Higher capacity interoffice transport" must include any technology that is offered or made available with that transport on a regular or routine basis, e.g., SONET. This requirement applies to all references to "higher capacity interoffice transport" in this Section 1.6.

Beginning October 2, 2006, SBC Texas shall have no obligation to continue to provide the HFPL for CLEC to provide xDSL-based service to any New End-Users that CLEC began providing xDSL-based service to over the HFPL on or after October 2, 2003 and before December 3, 2004. Rather, effective October 2, 2006, CLEC must provide xDSL-based service to any such new end-user customer(s) via a line splitting arrangement, over a stand-alone xDSL Loop purchased from SBC Texas, or through an alternate arrangement, if any, that the Parties may negotiate. Any references to the HFPL being made available as an unbundled network element or "UNE" are hereby deleted from the underlying Agreement.

9. Except as prohibited or otherwise affected by the *Interim Order*, nothing in this Amendment shall affect the general application and effectiveness of the Interim Agreement's "change of law," "intervening law", "successor rates" and/or any other similar provisions and/or rights under the Interim Agreement. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.
10. This Amendment shall be deemed to revise the rates, terms and provisions of the Agreement, including without limitation all associated prices in the Agreement to the extent necessary to give effect to the terms and conditions of this Amendment. In the event of a conflict between the terms and conditions of this Amendment and the rates, terms and conditions of the Agreement, this Amendment shall govern. By way of example only, if the Agreement provides that a combination of UNEs must be provided by SBC Texas, CLEC may not obtain a combination including one or more elements affected by Section 1.0 "Declassified Elements No Longer Required," above. By way of additional example only, if the Agreement provides (or assumes) that a UNE must be provided by SBC Texas, elements affected by Section 1.0 "Declassified Elements No Longer Required" are, nonetheless, not required to be provided, except to the limited extent set forth in Section 1.0 "Elements No Longer Required" and in such case, any rates for Elements No Longer Required under the Agreement shall be deemed removed from the Pricing Schedule to the Agreement.
11. This Amendment may require that certain sections of the Agreement shall be replaced and/or modified by the provisions set forth in this Amendment including without limitation certain sections not explicitly identified in this Amendment. The Parties agree that such replacement and/or modification shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement. Rather, the Agreement shall automatically be deemed to be modified by way of this Amendment to the extent necessary to implement the provisions of this Amendment.
12. Nothing in this Amendment shall be deemed to affect the right of a Party to exercise any rights it may have under the Interim Agreement including, without limitation, its intervening law rights, any rights of termination, and/or any other rights available to either Party under the Interim Agreement.
13. Although it is not necessary to give effect to the terms and conditions of this Amendment, including pricing provisions, upon written request of either Party, the Parties may amend any and all Interim Agreement rates and/or pricing schedules to formally conform the Interim Agreement to reflect the terms and conditions of this Amendment.
14. Notwithstanding any contrary provision in the Interim Agreement, this Amendment, or any applicable SBC tariff, nothing contained in the Interim Agreement, this Amendment, or any applicable SBC tariff shall limit SBC Texas's right to appeal, seek reconsideration of or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance or statute issued by the Texas PUC, the FCC, any court or any other governmental authority related to, concerning, or that may affect SBC Texas's obligations under the Interim Agreement, this Amendment, any applicable SBC tariff, or applicable law.

15. **PERFORMANCE MEASURES and REMEDY PLAN:** The performance measures and the existing remedy plan contained in the T2A for ordering, provisioning and maintenance shall apply to all High-Capacity Loops and Transport, and all Mass-Market Switching/UNE-P access lines during the period in which this Amendment is effective.
16. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, to the extent the Parties have not yet fully incorporated them into this Agreement or which may be the subject of further government review: *Verizon v. FCC*, et. al, 535 U.S. 467 (2002); *USTA, et. al v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); the FCC's Triennial Review Order (rel. Aug. 21, 2003) including, without limitation, the FCC's MDU Reconsideration Order (FCC 04-191) (rel. Aug. 9, 2004) and the FCC's Order on Reconsideration (FCC 04-248) (rel. Oct. 18, 2004); the FCC's Triennial Review Remand Order (rel. Feb. 4, 2005), WC Docket No. 04-313; CC Docket No. 01-338; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Parties further acknowledge and agree that this Amendment is to effectuate an Interim Agreement for a finite period of time to afford the Texas PUC and the Parties additional time to finalize a successor interconnection agreement based upon the provisions set forth herein. Therefore, the Parties acknowledge and agree that: (i) because this Amendment is to effectuate an Interim Agreement and not a final 251/252 Interconnection Agreement between the Parties; and (ii) effectively incorporates pricing changes into the Interim Agreement; and (iii) the Interim Agreement contains certain arbitrated provisions; and (iii) portions of the Interim Agreement are the result of CLEC's prior decision to opt into the T2A Agreement or parts thereof; that no aspect/provisions of this Interim Agreement qualify for portability into Illinois or any other state under 220 ILCS 5/13-801(b) ("Illinois Law"), Condition 27 of the Merger Order issued by the Illinois Commerce Commission in Docket No. 98-0555 ("Condition 27") or any other state or federal statute, regulation, order or legal obligation (collectively "Law"), if any.

# **EXHIBIT E**

DOCKET NO. 28821

ARBITRATION OF NON-COSTING  
ISSUES FOR SUCCESSOR  
INTERCONNECTION AGREEMENTS  
TO THE TEXAS 271 AGREEMENT

§  
§  
§  
§

PUBLIC UTILITY COMMISSION  
OF TEXAS

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PROPOSED ORDER ON CLARIFICATION

This Order clarifies Order No. 39<sup>1</sup> regarding the Interim Agreement Amendment applicable to the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs).

The Commission clarifies its intent that, as used in sections 1.3.1 and 1.3.2 of the Interim Agreement Amendment,<sup>2</sup> “embedded base” or “embedded customer-base” refers to existing customers rather than existing lines. The *Triennial Review Remand Order (TRRO)*<sup>3</sup> preserved mass market local circuit switching during the transition period for the embedded customer base of UNE-P customers, requiring that “incumbent LECs must continue providing access to mass market local circuit switching . . . for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements.”<sup>4</sup> The Commission notes that the conflicting interpretations of “embedded customer-base” will be an issue in Track II of this proceeding. However, until a final determination of this issue, SBC Texas shall have an obligation to provision new UNE-P lines to CLECs’ embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations. Any price differential for which SBC Texas may seek true-up shall be addressed in Track II or a subsequent proceeding.

Further, the Commission notes that in view of the FCC’s February 4, 2005, letter requesting ILECs to designate wire centers as Tier 1 and Tier 2, Sections 1.5 and 1.5.1 of the Interim Agreement Amendment may require clarification.<sup>5</sup> Accordingly, the Commission

<sup>1</sup> Order No. 39, Issuing Interim Agreement Amendment (Feb. 25, 2005).

<sup>2</sup> Order No. 39, Issuing Interim Agreement Amendment at 7 (Feb. 25, 2005).

<sup>3</sup> *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 (Feb. 4, 2005) (*Triennial Review Remand Order*).

<sup>4</sup> *Triennial Review Remand Order* at para. 216.

<sup>5</sup> Order No. 39, Issuing Interim Agreement Amendment at 8 (Feb. 25, 2005).

clarifies that, unless the FCC approves the list of wire centers designated by SBC Texas in its February 18, 2005 filing, paragraph 234 of the *TRRO* allows CLECs to self-certify their eligibility for dedicated transport and high-capacity loops and requires ILECs to provision the UNE before submitting any dispute regarding eligibility for the UNE. However, if the FCC approves the wire centers identified by SBC Texas, the PUC clarifies its intent that the FCC's determination shall be dispositive of the disputes regarding eligibility for the UNEs.

SBC Texas shall provide a copy of this Order to those CLECs to which SBC Texas sent the February 11, 2005 Accessible Letters regarding the circumstances in which it intends to deny access to those UNEs addressed in this Order.

SIGNED AT AUSTIN, TEXAS the \_\_\_\_\_ day of \_\_\_\_\_ 2005.

**PUBLIC UTILITY COMMISSION OF TEXAS**

\_\_\_\_\_  
**JULIE PARSLEY, COMMISSIONER**

\_\_\_\_\_  
**PAUL HUDSON, CHAIRMAN**

\_\_\_\_\_  
**BARRY T. SMITHERMAN, COMMISSIONER**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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CERTIFICATE OF SERVICE

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused a Letter in Docket No. 2004-316-C to be served upon the following this March 9, 2005:

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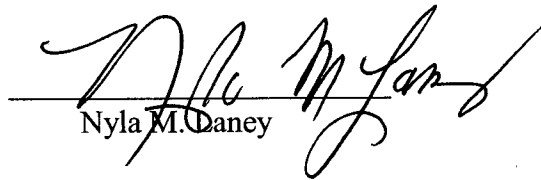
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